IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 109

SEA-LAND SERVICE, INC., *Appellant*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Connecticut

REPLY BRIEF FOR APPELLANT SEA-LAND SERVICE, INC.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT

The point in controversy here is whether or not Section 15a(3) of the Interstate Commerce Act prohibits the Interstate Commerce Commission from declaring unlawful reduced railroad TOFC rates that it finds would threaten the extinction of what remains of the

deep water coastwise common carriers, which carriers are found to be efficiently operated and militarily and commercially essential to the nation's transportation system. The Commission, Sea-Land and Seatrain contend that Section 15a(3) does not preclude this action. The United States took the same position before the lower Court. In fact it not only joined in the Commission's brief before that Court but filed a supplemental memorandum in which it argued, among other things, (a) that the Commission did not abuse its discretion in concluding that the rail carriers had not shown their rates to be just and reasonable, since the latter failed to establish that they were the low cost mode; (b) that the Act forbids the Commission to allow the rate policy that the railroads have proposed, i.e. a policy of selective rate discrimination by a higher cost mode; (c) that measured even by anti-trust standards the railroads' discriminatory rate policy is unlawful since its necessary effect is to harm a competing mode; that although specific intent is necessary to sustain an anti-trust violation, intent may be inferred, as here. (Memorandum to lower Court pp. 8-13).

There is not at issue before this Court the questions of whether or not Sea-Land and Seatrain must in fact maintain rates lower than rail rates in order to compete; whether or not the rail rates at issue would in fact lead to the extinction of the coastwise water carrier industry;[1] or whether or not Sea-Land is the low

[1] In footnote at Brief pp. 24 and 25 appellees purport to show that the Domestic Merchant Marine has actually grown in size since before World War II. Of course, the vast majority of the vessels referred to as operating today are carriers of bulk traffic, principally petroleum, most of which are operated privately by oil companies. In 1960, according to the same source cited by appellees (Domestic Oceanborne and Great Lakes Commerce of the U.S.,

cost carrier vis-a-vis the rail TOFC services, at least insofar as the rates at issue are concerned. All of these questions have been answered by the Commission in the affirmative, and these findings were not disturbed by the lower court and have not been challenged in this Court.[1]

ARGUMENT

I. Reply to the Appellee's Contention That the Commission's Condemnation of the Rail Rates at Issue is Inconsistent With Section 15a(3)

The arguments of the appellees, designed to place their own limited interpretation on the term "destructive competitive practices", and on the powers of the Commission to intercede in intermodal rate controversies, have been substantially disposed of in the opening briefs of appellants. We have shown that the legislative language that the appellees themselves urged

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U.S. Dept. of Commerce, Maritime Administration, Page XfX) of the domestic cargo moving in the North Atlantic, South Atlantic and Gulf trades 124,304,297 short tons, or about 88 *per cent*, moved in tankers. The problem here is the preservation of common carrier, deep water dry cargo vessels. The fact remains that whereas there were 139 such vessels operating in the Atlantic Gulf—Coastwise trade in 1939, (R. 10) today there are 8—3 operated by Sea-Land and 5 by Seatrain.

[1] Neither is there involved the question of whether or not the appellee railroads sought to establish the reduced TOFC rates for the specific purpose of destroying Sea-Land or Seatrain—a purpose which disavowed by appellees at Page 5 of their brief. It should be noted, however, that as argued by the United States to the Court below specific intent is not a requisite to a finding of an anti-trust violation. In *Times-Picayune* v. *United States*, 345 U.S. 594, 614 this Court found that the contracts there involved "may yet be banned by § 1 (of the Sherman Act) if unreasonable restraint was either their object *or* effect." (emphasis added)

upon the Congress, and which would have accomplished that which they now contend was in fact accomplished, was unequivocally rejected. However, we are constrained to comment upon what appears to be an effort by the appellees to throw this proceeding out of perspective by minimizing the effect of the lower Court's opinion, while at the same time exaggerating the effect of the Commission's report, on future intermodal rate proceedings generally.

Appellees now seem to presume that the latter stands for the proposition that the Commission has virtually a free hand in condemning any rate reduction that would adversely affect any competing mode—be it motor carrier, inland waterway operator, or for that matter, freight forwarder. All of the appellees' arguments against the Commission's report avoid an integral part of the problem that was presented to the Commission and to the Court below, i.e. the fact that the competition aimed at by the TOFC rates at issue, and which would have been destroyed by such rates, was the competition of the *deep water coastal common carriers —found to be militarily and commercially essential*— not carriers of any other type. Thus in the factual background of the two District Court decisions cited by appellees (pp. 14-15) a highly important ingredient, necessary to make these decisions apposite, was missing. That is to say, *the carriers at which the reduced rail rates were there aimed were not deep water coastal carriers, nor was there a finding as to the military or economic essentiality of those carriers.*

The Commission's report below did not rest merely upon a finding that the rail TOFC rates at issue were destructively competitive because they would destroy another mode, and that the Congress intended that all

modes be preserved. Instead it went to great lengths to spell out why the *deep water coastal carriers*, threatened by the TOFC rates, are of specific and particular importance to the nation's welfare, both military and economic; why their protection from competition that would destroy them is in the public interest. Thus the Commission refers (R. 38) to "the importance of *coastwise shipping* for national defense purposes" as "emphasized repeatedly" by various Governmental sources (italics added), quoting one of those sources. Later it referred to a report by a Senate Committee devoted specifically to the *deep water* domestic Merchant Marine (R. 39). Finally, it quoted from its previous decision in *War Shipping Administration TA Application*, 261 I.C.C. 589, which referred to the particular economic importance of *coastal* shipping.

There is thus not here before the Court the question of how far the Commission may or may not go in proscribing rate reductions that would have the effect of forcing particular motor carriers, inland water carriers, or for that matter freight forwarders, out of business. Rather there is only the question of what the Commission may, or may not, do to forestall rate practices that will spell the demise of the deep water, coastwise common carrier industry. Appellee's apparent position that the decision in this proceeding will serve as a guide to the Commission in *all* future constructions of Section 15a(3) is without basis.

Beginning at Page 16 of their brief, appellees refer to certain legislative history as supporting their contention that Section 15a(3) indicates a Congressional intent to change substantially the "ground rules" covering intermodal rate making. The citations and

argument of the appellees to the contrary notwithstanding, we reiterate that the lgislative history of Section 15a(3) firmly supports our contention that it was the intent of Congress that the Commission retain the power to exercise discretion in the adjudication of intermodal rate controversies, in the proper circumstances and on proper findings.

The appellees themselves urged to the Congress legislative language (the "three shall nots") that would have virtually stripped the Commission of discretion in intermodal rate controversies.[1] The enactment of this legislation was vigorously opposed by water carriers, motor carriers and the Commission.[2] Commissioner Freas of the Interstate Commerce Commission (then Chairman) suggested alternative language which would have directed the Commission to give due consideration to the "inherent cost and service advantages of the respective carriers." This suggestion was also rejected. Previously, the Secretary of Commerce had made a recommendation (not adopted) which would have eliminated the words "unfair or destructive practices" from the transportation policy. (H.R. 6141, 84th Cong. 2d Sess.) A later proposal of the Secretary of Commerce for the imposition of anti-trust standards, i.e. that the Commission might take into account the impact of a rate on competition "only where its effect might be substantially to lessen competition or tend to create a monopoly in the transportation industry or where the rate was established for the purpose of eliminating or injuring a competitor," also was not

[1] Hearings before the Sub-committee on Surface Transportation of the House Interstate and Foreign Commerce, 85th Cong. 1st Sess. April, 1957, at 5.

[2] 1956 hearings before House Sub-committee, pp. 1767-1771.

adopted.[1] A Senate Commerce sub-committee recommended the enactment of language in Section 15a(3) which would have instructed the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, to "consider the facts and circumstances attending the movement of the traffic by railroads and not by such other modes." (S. Rep. 1647, 85th Cong. 2d Sess.) This recommendation also was rejected.

Had the Congress intended virtually to deprive the Commission of all discretion in the adjudication of intermodal rate controversies—to have relegated it to the role of a "computer of costs"—it obviously would have done so by legislation similar to the "three shall nots." In rejecting this and like proposals, responsive to the strenuous objection of the water carriers, and the motor carriers, as well as the Commission itself, Congress made it clear that the railroad-sought license to indulge in rate making practices without regard to the effect upon competing modes was being unmistakably denied. The Congress made it clear that the national transportation policy is not "dead" legislation, without current meaning and effect. Destructive competition, specifically proscribed in the policy, was recognized by the Congress as a force fully as evil as when the policy was enacted 18 years before.

The interpretation of Section 15a(3) contended for by the appellees is in error.

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[1] Hearings on Problems of the Railroads before the Sub-committees on Surface Transportation of the Senate Interstate and Foreign Commerce Committee, 85th Cong. 2d Sess., p. 2353.

II. Reply to the Appellees's Argument That the National Transportation Policy Does Not Empower the Commission to "Deviate from the Basic Scheme of Economic Regulation" in Order to Preserve Carriers Under Any Circumstances

The United States, while appearing to agree with the lower Court's basic philosophy, concedes that if what it considers adequate findings were made as to the national defense or economic essentiality of the Domestic Merchant Marine the Commission could go beyond what otherwise are considered by it to be the borders of its statutory authority. (United States brief, pp. 44, 46, 48). The appellees, however, contend that under no circumstances could national defense considerations cause any relaxation of what they conceive to be the present statutory standard (pp. 26-28). Thus the appellees would accord the Commission no leeway, flexibility or discretion in adjudicating intermodal rate controversies; the "national defense" provision of the national transportation policy would be, as far as the appellees are concerned, a pious platitude without practical significance. To this end they have seized upon the novel interpretation by the lower Court of the national defense aspect of this proceeding, i.e. that a transportation system adequate for the nation's defense is a "hoped for end" of the national transportation policy—not an "operative policy or means" (R. 256).

In *United States* v. *Capital Transit Company*, 325 U.S. 357, involving the reasonableness of bus fares paid by army and navy employees, this Court said:

> "Congress unequivocally reserved to the Commission power to regulate reasonableness of interstate rates in the light of the needs of national defense" (p. 362).

Clearly the "national defense" is not merely a "hoped for" end of the national transportation policy,

but is rather *one of the specific ultimate objectives of that Policy, and of the Act itself.* Rather than being subordinate to the other provisions of the Act, the converse is true. Thus if there were indeed a conflict here between Section 15a(3) and the national defense provision of the policy (which we deny), the former must give way to the broader purposes of the latter.

Can it be seriously questioned that deep water carriers, particularly of the more flexible and efficient containership type, are of significant—even unique—value to the nation's defense in times of emergency? At the outset of World War II all of the deep water domestic dry cargo vessels were promptly taken over by the Government for military purposes. The vessels of both Sea-Land (Pan Atlantic) and Seatrain played important roles in the war effort, a number of Sea-Land's vessels being lost in enemy action. The military importance of vessels of the domestic fleet is substantially greater than that of vessels engaged in foreign commerce for the practical reason that they are at all times available and can immediately be put into service when the need arises.[1] Would anything have been added

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[1] See document submitted to Senator Butler by Vice Admiral John Sylvester, Deputy Chief of Naval Operations (Logistics) dated March 10, 1961 entitled "Ocean Shipping to Support the Defenses of the United States", Department of the Navy (1961) at 107 Cong. Rec. 7299-7302 (1961), in which the importance of the domestic deep water fleet because of its ready availability in time of emergency, and the added importance of vessels "adapted for rapid cargo handling," and "uniquely fitted to act as a link between our coastal cities during the period of likely disruption of land transportation", giving them an increased value in the event of a major nuclear war, was emphasized (pp. 7300, 7301).

See also, testimony of Vice Adm. Ralph E. Wilson, Hearings before Merchant Marine & Fisheries Subcommittee of Senate Commerce Committee on "Decline of Coastwise and Intercoastal Ship-

to the record in the proceeding before the Commission if military personnel had testified to these obvious facts; or would the Commission's report have been strengthened if it had made reference thereto, in addition to its references to Maritime Administration and Congressional Committee expressions of the military importance of domestic shipping? We think not.

We reiterate that judicial construction of Section 15a(3), and indeed all of the sections of the Act, should begin with, and be in the light of, consideration of the ultimate and over-all aims of the Act, one of which is the "developing, coordinating and preserving (of) a national transportation system, by water, highway and rail as well as other means adequate to meet the needs of the commerce of the United States, of the Postal service, and of the national defense." In holding that the preservation of domestic deep water carriers as necessary instruments of national defense is a goal subordinate to other provisions of the Act, the appellees and the Court below err.

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ping Industry", 86th Congress 2nd Sess. (1960) pp. 105-106, to the same effect.

See also President Kennedy's special message to Congress on regulatory agencies, on April 13, 1961, in which he stated that "it is disturbing * * *to note that, for example, our *common carrier* inland waterway traffic, our Great Lakes traffic, our *intercoastal and coastal traffic* have been withering away, at a pace far more rapid than appears desirable in the light of the low cost nature of this method of transportation *and its potential role in the event of war*. R. H. Doc. No. 135 87th Cong. 1st Sess. (1961), reprinted at 107 Congressional Record 5814 (1961). (emphasis added)

III. Reply to the Appellees' Argument That the Effect of the Opinion Below Is Not to Make Relative Cost the Controlling Consideration in Intermodal Rate Controversies

Perhaps fearful of the consequences to themselves of a "relative cost" standard in intermodal rate adjudication, the appellees profess not to read in the lower Court's opinion an espousal of that standard. Although we would like to agree, we cannot. Throughout the opinion there are repeated references to the "inherent advantage" provision of the national transportation policy (R. 248, 250, 252) and to "low cost mode" (R. 255, 256, 258, 259). The Court's view that relative costs were of "critical" importance (R. 252) was at the heart of its construction of Section 15a(3); hence was the reason why it disagreed with the Commission's view that under the circumstances here, relative cost was not controlling. Much as the appellees may wish to dismiss as dicta the Court's expressions of approval of "relative cost" as the controlling standard, their efforts to this end are unpersuasive.

The practical reasons why the application of relative cost standards as controlling in intermodal rate making would not only be unworkable but wholly inimical to the nation's transportation system were readily apparent to the Commission, and should have been equally apparent to the lower Court. Transportation cost finding is a complex, and at best an inexact, science, as this Court recognized in *New York* v. *United States*, 331 U.S. 284.[1] Moreover, the end re-

[1] "The appraisal of cost figures is itself a task for experts, *since these costs involve many estimates and assumptions and*, unlike a problem in calculus, *cannot be proved right or wrong*. They are, indeed, *only guides to judgment*. Their weight and significance require expert appraisal.

The Commission has concluded that while cost studies are highly

sults of "cost studies" are premised upon factors of a variable and continually shifting nature. The railroad cost of transporting commodity A from X to Y in any given period will depend upon factors such as average load of commodity A, as well as all commodities; the extent of equipment utilization on return hauls; the type of rail cars used. The cost of a water carrier movement from point X to point Y will depend upon factors such as the gateway ports served at the time, the costs

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relevant to these rate problems they are not conclusive. It said in this case:

> 'Discretion and flexibility of judgment within reasonable limits have always attended the use of costs in the making of rates. Costs alone do not determine the maximum limits of rates. Neither do they control the contours of rate scales. Other factors along with costs must be considered and given due weight in these aspects of rate making.' 262 I.C.C. p. 693". (328)

* * * * *

"These problems of transportation economics are complicated and involved. For example, the determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated.[33] Moreover, the impact of a particular order on revenues and the ability of the enterprise to thrive under it are matters for judgment on the part of those who know the conditions which create the revenues and the flexibility of managerial controls." (335)

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[33] See Hamilton, Cost as a Standard for Price, 4 Law & Contemp. Prob., 321, 329:

> "Now and then a hardy soul, equipped with simple faith and a calculating machine, essays the adventure of rates based upon the true costs of particular services. The feat is, of course, technically impossible, for value judgments or empirical rules are essential to the distribution of overhead. A calculation of the real cost of transporting cotton-seed in less than carload lots from Lampassas, Texas to Kankakee, Illinois, is a stubborn exercise in imputation." (emphasis added)

of connecting motor carriers, the age and value of the vessels in use, and the degree of utilization of the load capacity of the vessels. Any material change in any of these railroad or water carrier factors will materially alter the respective costs. In its report below the Commission specifically commented upon the practical difficulties of relative intermodal cost finding, noting that the rail T.O.F.C. costs of handling the traffic under consideration would depend upon the type equipment used (i.e. one or two trailer flatcars); that the Sea-Land costs would depend upon what ports were served (R. 36).[1]

In these circumstances the practical unfeasibility of predicating a relative rate structure solely, or mainly, with regard to relative cost is quite apparent, as is the impracticability of fixing the measure of differentials on the precise basis of the difference in costs, as now suggested by the United States. In a given period one carrier or carrier mode may under recognized cost finding procedures be found to be low cost; in a different period a competing carrier or carrier mode may be low cost.

We submit that in enacting Sec. 15a(3) the Congress may not be presumed to have invoked a hard and fast system of rate making, the implementation of which would inevitably produce widespread rate instability and uncertainty, to say nothing of gross inequities between the carrier modes and shippers. Certainly the deep water domestic water carrier industry, especially in its present marginal status, would not be able to survive even a short period of such rate instability and uncertainty.

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[1] "Relative costs" rates would also inevitably produce countless violations of Sections 2 (discrimination), 3 (preference and prejudice) and 4 (long and short haul) of the Interstate Commerce Act.

IV. Reply to Brief of the National Industrial Traffic League as Amicus Curiae

The National Industrial Traffic League is an association composed entirely of shippers or shipper organizations (N.I.T.L. brief, pp. 1, 2). Traditionally, a principal preoccupation of shipper organizations such as this is in the securing of reductions in freight rates. Frequently, as here, they adopt the short range viewpoint and contend for a course of action that will result in immediate rate reductions, without consideration to the long range effect on the nation's common carriers. The League is indeed naive if it does not recognize the fact that once the deep water common carriers have been removed from the national scene by the selective rate cutting of the railroads, the latter's rates between coastal areas will promptly be restored to the same basis as applied between inland points—a course of action *not* prevented by Sec. 4(2), contrary to the lower court's finding. See *Skinner* v. *Eddy*, 249 U.S. 557, 568. That this has been the history of railroad practices is well known to all students of transportation, as reflected for example in the debates leading to the enactment of the 1958 act.[1]

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[1] "MR. KEFAUVER: We know that in the past some efforts were made by some carriers to reduce their rates on a part of a system where they were competing with a water carrier, with the point in mind of almost eliminating the competition of the water carrier. It was alleged that this might be done in order to get the water carrier out of business, and then raise rates later, and also making up the losses on some other parts of the system. I am sure that this is not being contemplated under the language of the provision we have been discussing, or that that is the intention of the language." (104 Cong. Rec. 10859)

As stated by Congressman Esch of the House Committee on Interstate and Foreign Commerce, relative to the impending addition of the minimum rate power in the Transportation Act of 1920:

"You know the story—you can read it upon every mile of every inland waterway of the United States—how the water

The N.I.T. League has taken no part in this proceeding heretofore. We urge that its belated appearance on the scene in behalf of the railroads be not construed as any indication of substantial shipper disinterest in the preservation of deep water common carriers. The widespread support of these services over the years by shippers in or near coastal areas, as reflected in part by their testimony in numerous Commission reports dealing with applications for operating authority,[1] should serve to dispel any notion that the shipping public has no material stake in continued coastwise common carrier services.

CONCLUSION

The contentions of the Appellees and the National Industrial Traffic League are without merit, and should be rejected.

Respectfully submitted,

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carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route; and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before." 58 Cong. Rec. 8317, Nov. 11, 1919.

[1] As for example in *Pan-Atlantic SS Corp. Extension—Baltimore*, 265 I.C.C. 215, 217-25; *Newtex SS Corp. Extension—Philadelphia*, 265 I.C.C. 281, 283; *Waterman SS Corp. Extension—California Eastbound*, 285 I.C.C. 9, 12; *Isbrandtsen Co., Inc., Common Carrier Application*, 285 I.C.C. 369, 374; *West Coast Transoceanic SS Line Com. Car. Application*, 285 I.C.C. 381, 395.

Proof of Service

I, Warren Price, Jr., attorney for Sea-Land Service, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of February, 1963, I served copies of the foregoing Reply Brief for Appellant Sea-Land Service, Inc. on the several parties hereto as follows:

1. On the United States, by mailing copies, in duly addressed envelopes, with first class postage prepaid, to Robert C. Zampano, Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Connecticut; to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to Honorable Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.; and to Joel E. Hoffman, Esq., Antitrust Division, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid to Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.; and to B. Franklin Taylor, Jr., Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Appellees herein, by mailing copies in duly addressed envelopes, with first class postage prepaid to their counsel of record as follows: Eugene Hunt, Esq., and Thomas P. Hackett, Esq., 54 Meadow Street, New Haven 6, Connecticut; Carl Helmetag, Jr., Esq. 1138 Transportation Center, Six Penn Center Plaza, Philadelphia 4, Pennsylvania.

4. On the Appellant in No. 110, Seatrain Lines, Inc., by mailing copies in duly addressed envelopes with

first class postage prepaid, to its counsel of record as follows: Alan S. Fuller, Esq., and Ralph D. Ray, Esq., Chadbourne, Parke, Whiteside & Wolff, 25 Broadway, New York 4, N. Y.; Gambart, Corbin, Tyler & Cooper, 205 Church Street, New Haven, Connecticut.

5. On *amicus curiae* Waterways Freight Bureau by mailing copy in duly addressed envelope, with first class postage prepaid to Samuel H. Moerman, Esquire, 743 Investment Building, Washington 5, D. C.

6. To *amicus curiae* The National Industrial Traffic League by mailing copy in duly addressed envelope with first class postage prepaid to John F. Donelan, Esquire, 707 Munsey Building, Washington 4, D. C.

7. To *amici curiae* American Trucking Associations, Inc., and National Motor Freight Traffic Association, Inc., by mailing copy in duly addressed envelope, with first class postage prepaid to Peter T. Beardsley, 1616 P Street, N. W., Washington, D. C. and Bryce Rea, Jr., Esquire, 1616 P Street, N. W., Washington, D. C.

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